UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

SIMONE JOYCE SOLOMON
Respondent

Docket Number 2012-0351
Enforcement Activity No. 4405978

DECISION AND ORDER

Issued: May 15, 2013

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

Senior Investigating Officer Mark Gibbs
Lieutenant John D. Nee
Chief Warrant Officer Dan Sammons

For the Coast Guard

Graham W. Syfert, Esq.

For the Respondent

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PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this Suspension and Revocation proceeding seeking revocation of Respondent Simone Joyce Solomon's Merchant Mariner's Document Number 184789. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On August 10, 2012, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7703(1)(B), alleging one count of Misconduct pursuant to 46 C.F.R. § 5.27. Specifically, the Coast Guard alleged that on July 2, 2012, Respondent participated in a random chemical test and wrongfully refused to test by providing a verified substituted urine sample.

Respondent filed her Answer on August 10, 2012, admitting all jurisdictional allegations, denying specific factual allegations, and requesting a hearing. On August 10, 2012, the Acting Chief Administrative Law Judge (ALJ) referred this case to the undersigned for hearing and disposition.

A hearing on this matter was held on January 15-16, 2013 in Jacksonville, Florida.[1] The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Senior Investigating Officer Mark Gibbs, Lieutenant John Nee, and Chief Warrant Officer Dan Sammons represented the Coast Guard. Mr. Graham Syfert, Esq. appeared on behalf of Respondent. At the hearing, the Coast Guard presented testimony of five (5) witnesses and offered eighteen (18) exhibits, all of which were admitted into the record. Respondent presented testimony of three (3) witnesses and offered seven (7)

[1] The undersigned did not receive finalized hard copies of the hearing transcript until April 9, 2013.

exhibits, all of which were admitted into the record. The list of witnesses and exhibits is contained in **Attachment A.** Counsel for both parties elected to make oral closing arguments at the end of the hearing. (See Tr. Vol. III at 170-177).[2] Both parties waived the opportunity to submit closing briefs. (See Tr. Vol. III at 178).

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

a. Specimen Collection

1. At all relevant times mentioned herein, Respondent was the holder of Merchant Mariner's Document No. 184789. (See Tr. Vol. I at 13).

2. Argent Marine, Respondent's employer, is the bareboat charterer of the vessel ALLIANCE CHARLESTON. (Tr. Vol. I at 68-69).

3. On July 2, 2012, Argent Marine ordered Respondent to submit to a random urine test. (Tr. Vol. I at 13, 80) (CG Ex. 19). 46 C.F.R. § 16.230.

4. Respondent submitted to the urinalysis while at port aboard the ALLIANCE CHARLESTON in Jebel Ali, United Arab Emirates (UAE). (Tr. Vol. I at 89) (CG Ex. 19).

5. Argent Marine ordered all crew members tested simultaneously; none of the crew members were aware they would be asked to provide a urine sample that day. (Tr. Vol. I at 42, 80).

6. Respondent testified that after being notified she needed to provide a urine sample, she waited in line with other crew members for approximately twenty (20) minutes. (Tr. Vol. III at 27-28, 41).

7. Respondent actually waited approximately seventy (70) minutes before providing a sample. (Tr. Vol. III at 42, 46) (CG Ex. 24).

8. Mr. Jezer Hualde, a Department of Transportation (DOT) certified specimen collector, collected Respondent's urine specimen. (Tr. Vol. I at 30) (CG Ex. 3, CG Ex. 7).

[2] Citations referencing the hearing transcript are as follows: Transcript, followed by Transcript Volume number, followed by the page number (Tr. Vol. __ at __). The pagination of Volume I and Volume II runs consecutively; Volume III re-starts at Page 1. The electronic and hard copy versions of the transcript contain pagination discrepancies; the pages referenced herein refer to the hard copy version.

9. Mr. Hualde followed the procedures set forth in 49 C.F.R. Part 40 while collecting Respondent's specimen. (Tr. Vol. I at 30-31).

10. On July 2, 2012, the temperature in Jebel Ali, UAE was extremely hot. (Tr. Vol. I at 43, Tr. Vol. III at 10-11).

11. After the collection, Mr. Hualde poured Respondent's urine sample into two vials: Sample A and Sample B. He filled Sample A to 30 milliliters and poured the remainder of the specimen into Sample B. (Tr. Vol. I at 47, 52-53).

12. Mr. Hualde noticed nothing suspicious about Respondent's urine sample. (Tr. Vol. I at 47, 55).

13. The temperature of Respondent's urine specimen was between 90 and 100 degrees. (Tr. Vol. I at 37) (CG Ex. 8).

14. Respondent was present when Mr. Hualde sealed the specimen. (Tr. Vol. I at 39).

15. Respondent testified she was not paying attention when her specimen was sealed, but nonetheless signed the Custody and Control Form (CCF) certifying the specimen bottles had been sealed in her presence. (Tr. Vol. III at 22, 35-36, 39, 41) (CG Ex. 8).

16. The urine samples taken from the ALLIANCE CHARLESTON were shipped out via local courier the following day. (Tr. Vol. I at 57-58).

17. Hershal Kohut, the Designated Employee Representative of Argent Marine, testified he has been involved with roughly one hundred (100) urine collections in the UAE; Respondent's sample is the only non-negative sample he has ever encountered. (Tr. Vol. I at 71).

b. The Testing Procedure

18. Erin Beller, Manager of the Substance Abuse Prevention Program at Anderson-Kelley, received a FedEx shipment of urine samples from the ALLIANCE CHARLESTON at her office in Mount Olive, New Jersey on July 10, 2012. (Tr. Vol. I at 91-92).

19. Ms. Beller kept the samples locked securely in her office until they were shipped to MEDTOX later that same day. (Tr. Vol. I at 110-11).

20. MEDTOX, a Substance Abuse and Mental Health Services Administration (SAMSHA) certified laboratory located in Minnesota, conducted testing on Respondent's urine in accordance with 49 C.F.R. Part 40. (Tr. Vol. I at 127-35, 138-39, 159) (CG Ex. 10, CG Ex. 19).

21. During the laboratory testing procedure, a total of three (3) aliquots were taken from Respondent's sample. (Tr. Vol. I at 142-43) (CG Ex. 19).

22. The first aliquot, tested on July 11, 2012, yielded a pH of 8.8 and a creatinine value of 1.4 mg/dL; no specific gravity measurement was taken. (Tr. Vol. I at 143-45, 147) (CG Ex. 19).

23. A pH between 4.5 and 9.0 is considered normal. (Tr. Vol. I at 170-71).

24. The second aliquot, tested on July 12, 2012, yielded a specific gravity of 1.0223. (Tr. Vol. I at 144) (CG Ex. 19).

25. The third aliquot, run for confirmatory testing, yielded a specific gravity of 1.0223 and a creatinine value of 1.3 mg/dL. (Tr. Vol. I at 145) (CG Ex. 19).

26. All of the aliquots were taken from the Sample A vial; Sample B belongs to the donor in case he or she wishes the challenge the results. (Tr. Vol. I at 166-67).

27. Respondent testified she was never offered the opportunity to have her specimen tested at another laboratory. (Tr. Vol. III at 23).

c. Test Results

28. Creatinine reflects metabolized muscle movement and the hydration state of the donor. (Tr. Vol. I at 174, 177).

29. Specific gravity represents the solvent/solute ratio; the more molecules in the specimen, the higher the specific gravity. (Tr. Vol. II at 265-66).

30. Generally, a high creatinine level corresponds with a high specific gravity, and a low creatinine level corresponds with a low specific gravity. (Tr. Vol. I at 193-94).

31. An acceptable creatinine reading is greater than twenty (20). A reading between five (5) and twenty (20) is considered potentially dilute. A reading of less than five (5) is abnormal and outside the acceptable range. (Tr. Vol. I at 175-76) (See CG Ex. 31). See 49 C.F.R. § 40.93(b).

32. The creatinine level of Respondent's urine was abnormally low; the specific gravity was high. (Tr. Vol. I at 196).

33. If the creatinine level is less than two (2) mg/dL and the specific gravity is greater than 1.0200 or less than 1.0010, the sample is considered substituted. (Tr. Vol. II at 219). 49 C.F.R. § 40.93(b).

d. Significance of the Test Results

34. Dr. Hani Khella, the Medical Review Officer (MRO), verified Respondent's urine sample as substituted. (Tr. Vol. II at 219, 225) (CG Ex. 13, CG Ex. 14, CG Ex. 17). 49 C.F.R. § 40.93(b).

35. Dr. Khella verified the sample as substituted based solely on the creatinine reading of 1.3 mg/dL and the specific gravity reading of 1.0223. (Tr. Vol. II at 237-38).

36. Dr. Khella contacted Respondent and inquired whether there was a legitimate medical reason for her abnormal results. (Tr. Vol. II at 220-23) (CG Ex. 15).

37. In response to Dr. Khella's inquiry, Respondent stated she took blood pressure medication, diuretic pills, and vitamins. (Tr. Vol. II at 223, 245).

38. Dr. Khella testified that although creatinine varies by gender and race, it is not physiologically possible to produce a very low creatinine and a specific gravity of 1.0223, as in the instant case. (Tr. Vol. II at 231-33).

39. Dr. Daniel Logan could not think of a physiologic process that could yield a creatinine reading of 1.3 mg/dL and a specific gravity reading of 1.0223. (Tr. Vol. III at 121).

40. Respondent testified she takes Lispril, Lysteda, vitamins, and Tums. (Tr. Vol. III at 17-19).

41. Respondent testified she takes as many as ten (10) Tums a day and drinks a great deal of water. (Tr. Vol. III at 19-21, 30, 48).

42. Dr. Khella testified a creatinine of 1.3 mg/dL and a specific gravity of 1.0223 cannot be achieved through any combination of medications; while diuretics could conceivably lower creatinine, they could not lower it to 1.3 mg/dL. (Tr. Vol. II at 246, 254).

43. Dr. Khella testified that if a sample is exposed to heat over time, the pH may rise if there is bacterial contamination; however, nothing will happen to the creatinine level because creatinine is heat stable. (Tr. Vol. II at 252-53).

44. Creatinine has a melting point of three hundred (300) degrees Celsius. Thus, even if Respondent's sample sat in extreme temperatures in the UAE for multiple days, the creatinine would not disappear or break down. (Tr. Vol. II at 260).

45. Dr. Khella was not certain what Respondent may have mixed with her urine, but explained the specimen was inconsistent with normal human urine. (Tr. Vol. II at 262, Tr. Vol. III at 154-55).

46. Adding water to human urine would not produce the result seen in the instant case, as water would cause both the creatinine and specific gravity to drop. (Tr. Vol. II at 265).

47. Adding salt water to the sample could possibly produce a similar result, as the high solute concentrate of salt would both increase the specific gravity and lower the creatinine. (Tr. Vol. II at 264-65).

48. One possible explanation for a very low creatinine level is renal failure; however, in the instant case, the specific gravity indicates Respondent's kidneys are functioning effectively. (Tr. Vol. II at 269).

49. Respondent submitted to another urinalysis upon her return home; the results were normal. (Tr. Vol. III at 32, 34).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, ALJs have the authority to suspend or revoke a mariner's license, certificate, or document for violations arising under 46 U.S.C. § 7703.

The Coast Guard's chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize the use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16. The marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 C.F.R. Part 40 and 46 C.F.R. Part 16.

Here, the Coast Guard has alleged one count of Misconduct pursuant to 46 C.F.R. § 5.27. Title 46 C.F.R. § 5.27 defines Misconduct as "…human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." In the instant case, the Coast Guard alleges Respondent was lawfully ordered to undergo a random urinalysis, and that, during the test, Respondent committed Misconduct by submitting a verified substituted result. 49 C.F.R. § 40.93(b).

A. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast

Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Sec. and Exch. Comm'n, 450 U.S. 91, 107 (1981).

The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Prod. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer (IO) must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed Misconduct.

B. Coast Guard's Argument

The Coast Guard proffers Respondent's employer, Argent Marine, lawfully ordered her to submit to a random urinalysis on July 2, 2012 while the ALLIANCE CHARLESTON was at port in Jebel Ali, UAE. (Tr. Vol. I at 13, 80, 89). 46 C.F.R. § 16.230. On that same date, Mr. Jezer Hualde, a certified DOT specimen collector, collected Respondent's sample in accordance with the procedures set forth in 49 C.F.R. Part 40. (Tr. Vol. I at 30) (CG Ex. 3, CG Ex. 7).

Mr. Hualde poured Respondent's specimen into two vials, sealing both vials in Respondent's presence; Respondent signed the CCF acknowledging Mr. Hualde sealed the specimen in her presence. (Tr. Vol. I at 39) (CG Ex. 8). Mr. Hualde packaged Respondent's sample with the twenty (20) other samples collected aboard the ALLIANCE CHARLESTON,

first storing the samples in an air conditioned room overnight, then shipping them to the United States via local courier the following day. (Tr. Vol. I at 58) (ALJ Ex. 1, ALJ Ex. 2).

Erin Beller, Manager of the Substance Abuse Prevention Program at Anderson-Kelley, received a FedEx shipment of the samples at her office in Mount Olive, New Jersey approximately one week later, on July 10, 2012. (Tr. Vol. I at 91-92). Ms. Beller kept the samples locked in her office overnight, and then shipped them to MEDTOX the following day. (Tr. Vol. I at 110-11). Ms. Beller testified she received the samples intact and noticed nothing unusual about them. (Tr. Vol. I at 109-110).

MEDTOX, a SAMSHA certified laboratory located in Minnesota, conducted the laboratory testing procedures in accordance with 49 C.F.R. Part 40. (Tr. Vol. I at 127-35, 138-39, 159) (CG Ex. 10, CG Ex. 19). During the testing procedure, a total of three (3) aliquots were taken from Respondent's urine sample. (Tr. Vol. I at 142-43) (CG Ex. 19).

The first aliquot, tested on July 11, 2012, yielded a pH of 8.8 and a creatinine value of 1.4 mg/dL; no specific gravity measurement was taken. (Tr. Vol. I at 143-45, 147) (CG Ex. 19). The second aliquot, tested on July 12, 2012, yielded a specific gravity of 1.0223. (Tr. Vol. I at 144) (CG Ex. 19). The third aliquot, run for confirmatory testing, yielded a specific gravity of 1.0223 and a creatinine value of 1.3 mg/dL. (Tr. Vol. I at 145) (CG Ex. 19).

The Coast Guard suggests Respondent submitted a substituted sample pursuant to the applicable regulations as her creatinine concentration was less than 2 mg/dL, and her specific gravity was greater than 1.0200. 49 C.F.R. § 40.93(b). Dr. Hani Khella, the MRO, thus properly verified Respondent's sample as substituted. (Tr. Vol. II at 219, 225) (CG Ex. 13, CG Ex. 14, CG Ex. 15).

Dr. Khella testified it was not physiologically possible for a human to produce such a urine sample, even if the sample was exposed to extreme heat over time. (Tr. Vol. II at 231-33, 252-53, Tr. Vol. III at 154-55). Although Respondent testified she took vitamins and various

medications, Dr. Khella opined Respondent's test results could not be achieved through any combination of medication. (Tr. Vol. II at 254).

C. Respondent's Argument

At the hearing, Respondent did not significantly call into question the chain of custody of the specimen or the laboratory testing procedures.[3] Instead, Respondent offered two main arguments in her defense. First, Respondent suggested the wording of 49 C.F.R. § 40.93(b) mandates that two (2) aliquots be taken from each urine sample, and that one creatinine and one specific gravity measurement be taken from each of the two aliquots. (See Tr. Vol. I at 199). In the instant case, the four (4) requisite data points were taken from three (3) separate aliquots instead of two (2). (Tr. Vol. I at 142-43) (CG Ex. 19).

Second, Respondent proffers the sample was exposed to excessive amounts heat while in transit from the UAE to the United States. Respondent suggests this extreme heat exposure altered the chemical composition of Respondent's urine, thereby causing the abnormal creatinine and specific gravity readings. (Tr. Vol. I at 43, Tr. Vol. III at 10-11).

D. Analysis

The Coast Guard has demonstrated through a preponderance of the reliable and probative evidence that Respondent refused to test in violation of 49 C.F.R. § 40.191(b) by submitting a verified substituted sample according to the parameters set forth by 49 C.F.R. § 40.93(b). For the reasons discussed herein, neither of Respondent's arguments refutes or undermines the Coast Guard's prima facie case of Misconduct.

[3] Respondent did bring attention to the fact that the specimen collector did not wear gloves, but did not allege how or why this would impact or invalidate the testing procedure. (Tr. Vol. I at 44-45, 115). See 49 C.F.R. Part 40. Respondent also alleged the MRO, Dr. Khella did not offer her the opportunity to have her sample re-tested. (Tr. Vol. III at 23). However, Dr. Khella credibly testified that when he calls donors he reads from a standard MRO interview script, informing each donor he or she has up to seventy-two (72) hours to request the split specimen be tested at another laboratory. (Tr. Vol. II at 220) (CG Ex. 15).

a. 49 C.F.R. § 40.93(b)

Respondent argues 49 C.F.R. § 40.93(b) mandates two (2) aliquots be taken from a urine sample, and, from this, four (4) data points extracted: one creatinine measurement and one specific gravity measurement from each of the two (2) aliquots. (See Tr. Vol. I at 199). In the instant case, a total of three (3) aliquots were taken. (Tr. Vol. I at 142-43) (CG Ex. 19). MEDTOX measured the urine creatinine level from the first and third aliquots, and the specific gravity from the second and third aliquots. (CG Ex. 19). Thus, Respondent contends Respondent's urinalysis was not conducted in accordance with 49 C.F.R. Part 40, specifically 49 C.F.R. § 40.93(b).

Title 49 C.F.R. § 40.93(b) states as follows:

> As a laboratory, you must consider the primary specimen to be substituted when the creatinine concentration is less than 2 mg/dL and the specific gravity is less than or equal to 1.0010 or greater than or equal to 1.0200 on both the initial and confirmatory creatinine tests and on both the initial and confirmatory specific gravity tests on two separate aliquots.

Respondent contends the language of 49 C.F.R. § 40.93(b) mandates two aliquots be taken from a urine sample, not three. (See Tr. Vol. I at 199). Respondent's argument in this regard is unpersuasive. The regulatory language references "the initial and confirmatory creatinine tests and…the initial and confirmatory specific gravity tests on two separate aliquots." 49 C.F.R. § 40.93(b). Thus, a plain reading of the provision requires only that the initial and confirmation tests be run from two (2) different aliquots; it does not specifically mandate the initial and confirmatory tests for creatinine be run from the exact same aliquots as the tests for specific gravity.[4]

[4] Further, Mitchell LeBard, the Associate Director for Forensic Toxicology at MEDTOX, credibly testified that, pursuant to federal requirements, if the initial creatinine level is abnormally low, the lab must perform a specific gravity test using a four digit refractometer as opposed to a three digit refractometer. (Tr. Vol. I at 145-47). The lab also performs an initial pH test, as "the pH reading chemically can be affected by the ionic strength [of urine with an unusually low creatinine]." (Tr. Vol. I at 174). Specific gravity must be tested with a four digit refractometer if the

Further, assuming, arguendo, that the language of 49 C.F.R. § 40.93(b) did require the initial and confirmatory tests for creatinine and specific gravity be run on the same two aliquots, the undersigned finds this error to be harmless. Regardless of the number of aliquots used, the measurements for both creatinine and specific gravity were initially calculated, and then confirmed, using two different samplings of Respondent's urine. Thus, Respondent has failed to explain how use of a third aliquot undermines the accuracy of the test in any meaningful way.

Respondent also questioned Dr. Khella, the MRO, as to the requirements of 49 C.F.R. § 40.93(b), inquiring as to how he was able to certify the specimen as substituted after reviewing only one creatinine and one specific gravity measurement. (Tr. Vol. II at 237-38). Ostensibly, counsel sought to suggest Dr. Khella could not have properly certified the sample as substituted absent a review of all four (4) data points. However, 49 C.F.R. § 40.93 states that "[a]s a laboratory, you must consider the primary specimen to be substituted when…". (Emphasis added). Thus, the provision is specifically directed at the laboratory, not the MRO. 49 C.F.R. § 40.93(b). Thus, Respondent's argument in this regard is also without merit.

b. The Scientific Evidence

i. Summary

Dr. Khella, the MRO, testified that while creatinine varies by gender and race, is not physiologically possible for a human to produce urine with a creatinine of 1.3 mg/dL and a specific gravity of 1.0223. (Tr. Vol. II at 231-33). He explained that while diuretics and

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creatinine is less than 5 mg/dL, and a pH test is required for samples with a creatinine level of less than 2 mg/dL. (Tr. Vol. I at 147-48).
Thus, due to Respondent's abnormally low creatinine reading, a specific gravity measurement was not taken from the first aliquot. Instead, the specific gravity was first recorded the following day using the second aliquot and the more specific four digit refractometer. (CG Ex. 19). Thus, the laboratory provided a cogent reason for the use of three (3) aliquots instead of two (2), and, ultimately, the creatinine and specific gravity of Respondent's urine were both tested twice. 49 C.F.R. § 40.93(b).

medication could conceivably lower creatinine, they could not lower it to a level of 1.3 mg/dL. (Tr. Vol. II at 246). The average urine creatinine is 130 mg/dL; any reading over three hundred (300) or under twenty (20) is considered abnormal. (Tr. Vol. III at 162).

Dr. Khella further testified creatinine is "heat stable" and would not decrease simply because a urine sample was exposed to hot temperatures. (Tr. Vol. II at 252-53). He explained creatinine has "a melting point of 300 degrees Celsius," suggesting that "[u]nless you're in a volcano," heat will not be a factor. (Tr. Vol. II at 258). Thus, "sitting in the desert [during shipment] is not going to cause the urine to degrade and cause…the creatinine to disappear, or to break down." (Tr. Vol. II at 258).

By contrast, Respondent's first medical witness, Dr. Dale Syfert, testified it was indeed physiologically possible for a human to produce urine with such readings, suggesting Respondent's low creatinine levels could be explained by her medications. (Tr. Vol. III at 71-72). Dr. Syfert also testified creatinine can degrade in high temperatures, especially when yeast or bacteria is present. (Tr. Vol. III at 73, 85, 92, 95). Last, Dr. Syfert described a creatinine level of 1.5 mg/dL as being "at the lower end of normal." (Tr. Vol. III at 84).

Respondent's second medical witness, Dr. Logan, testified he had never seen a case with a low creatinine and a high specific gravity, and could not think of a physiologic process that could yield such a result. (Tr. Vol. III at 121). He noted Lisinopril, one of Respondent's medications, "conceivably could cause" some lowering of the creatinine, but did not indicate whether the medication could explain a creatinine level of 1.3 mg/dL.

ii. Discussion

Among the three experts, Dr. Khella was the most qualified and the most credible. Notably, Dr. Khella is the only one of the testifying physicians currently certified as a Medical

Review Officer. (CG Ex. 13, CG Ex. 33). While Dr. Logan was previously certified as a MRO, his certification has lapsed. (Tr. Vol. III at 121) (Resp. Ex. 8). The record does not indicate Dr. Syfert, was ever certified as an MRO, and suggests his background is primarily in the field of emergency medicine. (See Tr. Vol. III at 66, 79) (Resp. Ex. 7).

Of the testifying physicians, Dr. Khella was the most knowledgeable and credible on the subject matter. He was particularly informative regarding the effect of heat on creatinine, specific gravity, and pH. (Tr. Vol. II at 252-53, 260). He testified with great specificity, explaining creatinine has a melting point of three hundred (300) degrees Celsius. (Tr. Vol. II at 252-53). He unequivocally testified Respondent's sample was inconsistent with normal human urine, regardless of the medications Respondent may have been taking at the time. (Tr. Vol. II at 262, Tr. Vol. III at 154-55).

Respondent's medical witnesses, Dr. Syfert and Dr. Logan, were more equivocal. Dr. Logan testified Lisinopril could conceivably explain some lowering of creatinine due to its diuretic effects, and Dr. Syfert testified Respondent's low creatinine could be explained by medication. (Tr. Vol. III at 71-72, 119-21). However, both Dr. Logan and Dr. Syfert ultimately concluded there must have been something wrong with the testing procedures and/or the handling of the specimen. (Tr. Vol. III at 76, 98, 121).

Dr. Syfert testified the results could be explained by the hot temperatures to which Respondent's urine was exposed in the UAE, suggesting the "results are compatible with the way the specimen was handled," as creatinine will diminish when not refrigerated. (Tr. Vol. III at 100). However, Dr. Syfert conceded "we just don't know [by] how much," later stating that "temperatures above the normal in the 100 to 120 range," and not merely unrefrigerated temperatures, can degrade creatinine. (Tr. Vol. III at 85, 92, 95, 100).

When asked whether creatinine composition could change when exposed to high temperatures, Dr. Logan explained he was "not entirely sure that that's true or not," conceding "I

don't know that I can answer [that] for sure." (Tr. Vol. III at 127-28). Admittedly, Dr. Logan was also uncertain as to whether there was an upper limit to normal human creatinine levels. (Tr. Vol. III at 137).

While Respondent introduced two learned treatises into evidence, the undersigned considers neither study very probative, as Respondent presented minimal testimony as to the significance of the studies and/or how they relate to the instant case. (See Tr. Vol. III at 61-62, 92-93, 101-02, 104) (Resp. Ex. 4, Resp. Ex. 5).

Respondent also introduced evidence tending to show her prior urine screens were normal. (Resp. Ex. 3). Additionally, Respondent introduced evidence suggesting that, after returning to the United States, her urine again tested normal. (Tr. Vol. III at 32, 34). However, this evidence neither rebuts the Coast Guard's case nor explains the abnormal July 2, 2012 specimen. In fact, if anything, such evidence actually supports the Coast Guard's position, as it indicates Respondent has no physiological abnormalities, thereby making sample substitution the more likely explanation.

Interestingly, both Dr. Syfert and Dr. Logan testified they did not think substitution could explain Respondent's test results, suggesting one would have to be a skilled chemist to produce the test results seen in the instant case. Specifically, Dr. Logan testified that "it's possible [one could] add salt to a normal urine specimen and raise the specific gravity [to get these results]," but suggested "you have to be awfully lucky to get just the right amount of salt in it to be able to do it." (Tr. Vol. III at 122-23). He further testified:

> You just have to be incredibly lucky. And I asked that of a toxicologist as well. And they said, boy you—you just almost have to be down to measuring it with a micro scale to be lucky enough to hit that right on that number.
> (Tr. Vol. III at 132).

Similarly, Dr. Syfert testified that one explanation of the results was the specimen was "very skillfully and cleverly altered in some way," suggesting that if one was to obtain the result

by adding "baking soda or salt or sugar, [one] would have to weigh and measure that very, very carefully." (Tr. Vol. III at 76-77, 88). He further testified:

> [I]f I were to set out to [make a specimen that would yield similar test results], personally, as someone who trained in chemistry, I'd have to have very accurate calibrating burets, scales. I'd have to make a solution.
> I would have difficulty doing that in a –except—anywhere except in a chemistry laboratory. And that idea that I could just mix something up and dump it in and still come out with on-target specific gravity, a high pH and a low serum creatinine, I think that would give the average biochemist a good test question. (Tr. Vol. III at 77).

However, put simply, the specimen failed. Thus, Respondents' witnesses' assertions that Respondent would need either luck or skill to obtain the instant results are illogical. Pursuant to 49 C.F.R. § 40.93(b), Respondent's sample does not qualify as acceptable human urine. Any specimen with a creatinine less than 2 mg/dL and a specific gravity less than or equal to 1.0010 or greater than or equal to 1.0200 is considered substituted; the precise data points are moot. Thus, any insinuation that Respondent sought to achieve the precise creatinine and specific gravity levels present in her specimen is fallacious.

E. Conclusion

Accordingly, after careful review of the entire record, including the witness testimony, applicable statutes, regulations and case law, the undersigned finds the Coast Guard **PROVED** by a preponderance of the evidence that Respondent committed Misconduct by refusing to test in violation of 49 C.F.R. § 40.191(b).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein, Respondent was a holder of Merchant Mariner's Document No. 184789.

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(1)(B); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-59.

3. Respondent was lawfully directed to submit to chemical testing. 46 C.F.R. § 16.230.

4. The Coast Guard has **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed Misconduct pursuant to 46 C.F.R. § 5.27.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 C.F.R. §§ 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. § 7701; 46 C.F.R. § 5.5; Appeal Decision 1106 (LABELLE) (1959). Here, the Coast Guard proposes a sanction of revocation.

The 46 C.F.R. § 5.569 guidelines provide a "Suggested Range of Appropriate Orders" for various offenses. The purpose of the Table is to provide guidance to the Administrative Law Judge and promote uniformity in orders rendered. 46 C.F.R. § 5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174.

The undersigned has carefully reviewed the entire record and all of the evidence presented in this matter and notes the proposed sanction of revocation exceeds the suggested range of sanctions considered in the 46 C.F.R. § 5.569 guidelines. Here, Respondent was charged with wrongfully refusing to test pursuant to 49 C.F.R. § 40.191(b) by submitting a verified substituted sample.[5] The regulatory guidelines suggest a sanction of twelve (12) to twenty-four (24) months for "Refusal to take chemical drug test." 46 C.F.R. § 5.569.

[5] "As an employee, if the MRO reports that you have a verified adulterated or substituted test result, you have refused to take a drug test." 49 C.F.R. § 40.191(b).

Title 46 C.F.R. § 5.569 explains that, "[e]xcept for acts or offenses for which revocation is mandatory, factors which may affect the order include: (1) Remedial actions which have been undertaken independently by the respondent; (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation."

In the instant case, the undersigned finds a sanction within the Table guidelines appropriate. Neither side presented significant aggravating or mitigating factors to support a departure from the recommended guidelines. While the Coast Guard introduced case law wherein revocation was imposed for violations of 49 C.F.R. § 40.191(b), the governing case law does not mandate such a sanction. (CG Ex. 27-CG Ex. 30). See Appeal Decision 2646 (MCDONALD) (2004) (upholding the ALJ's sanction of twelve months for providing a verified substituted urine specimen). See also Commandant v. Ailsworth, NTSB Order No. EM-211 (2012) ("[T]he sanction of revocation in this case is in conflict with the sanction range articulated in the Coast Guard's regulation. If the Coast Guard believes these violations should carry a potential greater sanction, the Coast Guard has the ability to implement these changes through public rulemaking, rather than wholesale reliance on deference to the law judge's sanction."). Accordingly, the undersigned finds a sanction within the suggested range appropriate, and assesses a sanction of fourteen (14) months outright suspension.

On April 26, 2013, Respondent, through counsel, filed a "Notice of Inability to Work" with both the Coast Guard and the undersigned. In the Notice, Respondent's counsel stated Respondent had encountered an "inability to be employed due to the upcoming expiration of her Merchant Mariner Credentials set for August 2013." As such, Respondent requested "that any such suspensions or punishments which may issue in the pending ruling to consider and calculate these past three and a half months with a roadblock at every turn and resulting in an ultimate inability to obtain employment as a part of her punishment." As such, the Notice apparently

represents a motion for the undersigned to reduce Respondent's sanction due to Respondent's inability to find employment.

The undersigned may not reduce the sanction as a result of Respondent's suggestion, through motion, that she is unable to find employment. Respondent's assertions are vague and unsubstantiated; had Respondent provided additional evidence, the outcome may have been different. Further, there is no indication in the record Respondent has completed a good faith deposit of her credentials at any point; the undersigned has received nothing more than a general assertion of the inability to find employment. See APPEAL DECISION 2686 (SALAMON) (2010) (explaining an ALJ may credit the respondent with deposit time in the event of a good faith deposit.) Accordingly, there is insufficient evidence to warrant any reduction in sanction.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Respondent Simone Joyce Solomon's Merchant Mariner's Document Number 184789 is hereby **SUSPENDED** outright for a period of fourteen (14) months from the date of this Order.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004. (**Attachment B**).

_____

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date: May 15, 2013

ATTACHMENT A
WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Jezer Hualde
2. Hershal Kohut
3. Erin Beller
4. Mitchell LeBard
5. Dr. Hani Khella

RESPONDENT'S WITNESSES

1. Simone Solomon
2. Dr. Dale Syfert
3. Dr. Daniel Logan

EXHIBIT LIST

COAST GUARD'S EXHIBITS

CG Ex. 3 ALLIANCE CHARLESTON Crew List
CG Ex. 4 Copy of Simone Solomon's Passport
CG Ex. 7 Collector Qualification and Training
CG Ex. 8 Collector Federal Drug Testing Custody and Control Form (CCF)
CG Ex. 10 SAMSHA Accreditation for MEDTOX Laboratories
CG Ex. 11 Laboratory Custody and Control Form (CCF)
CG Ex. 13 MRO Qualifications
CG Ex. 14 MRO Custody and Control Form (CCF)
CG Ex. 15 MRO Standard Interview Script
CG Ex. 17 MRO Report
CG Ex. 19 Laboratory Litigation Package
CG Ex. 24 Crewmember Results
CG Ex. 27 USCG v. Gilroy
CG Ex. 28 USCG v. Langley
CG Ex. 29 USCG v. Langley CDOA
CG Ex. 30 USCG v. Sweeney
CG Ex. 31 Creatinine Concentrations in the U.S. Population
CG Ex. 33 Dr. Khella's Curriculum Vitae

RESPONDENT'S EXHIBITS

Resp. Ex. 1 MEDTOX Report and Report of Dr. Naeem Hader

Resp. Ex. 3 Respondent's Urinalysis Results
Resp. Ex. 4 "Normalization of Urinary Drug Concentrations with Specific Gravity and Creatinine"
Resp. Ex. 5 "Urine pH: the Effects of Time and Temperature after Collection"
Resp. Ex. 6 MRO Notes
Resp. Ex. 7 Dr. Syfert's Curriculum Vitae
Resp. Ex. 8 Dr. Logan's Curriculum Vitae

ALJ'S EXHIBITS

ALJ Ex. 1 Coast Guard's Response to ALJ's Order for Discovery, and Motion for Extension
ALJ Ex. 2 Coast Guard's Response to ALJ's Order Granting Motion for Additional Discovery

ATTACHMENT B
APPEAL RIGHTS

33 CFR 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

(1) Whether each finding of fact is supported by substantial evidence.

(2) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(3) Whether the ALJ abused his or her discretion.

(4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

(1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,

(2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

(i) Basis for the appeal;

(ii) Reasons supporting the appeal; and

(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
(c) No party may file more than one appellate brief or reply brief, unless --
(1) The party has petitioned the Commandant in writing; and
(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.